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Review of Robert G. Vaughn, The Successes and Failures of Whistleblower Laws

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Review of Robert G. Vaughn, The Successes and Failures of Whistleblower Laws

Abstract

Whistleblower laws are a source of both hope and frustration. When whistleblowers suffer reprisals, as so many of them do, the solution is widely assumed to be legal protection. When journalists ring me about whistleblowing matters, they frequently ask about whistleblower laws, assuming they are more important than anything else. However, many whistleblowers have learned to their dismay that legal protection looks much better on paper than it pans out in reality.

For two decades, members of Whistleblowers Australia have pushed for whistleblower laws, and at the same time have been persistent critics of the weaknesses of the laws on the books. It should be noted that governments, in passing whistleblower laws for all the states and territories in Australia, have seldom consulted whistleblowers - or, when they have, not taken much notice of their advice.

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The successes and failures of whistleblower laws

by Robert G. Vaughn

A book review published in [*The Whistle*](#) (Newsletter of Whistleblowers Australia), [No. 74, April 2013](#), pp. 9-11

Reviewer: Brian Martin

Whistleblower laws are a source of both hope and frustration. When whistleblowers suffer reprisals, as so many of them do, the solution is widely assumed to be legal protection. When journalists ring me about whistleblowing matters, they frequently ask about whistleblower laws, assuming they are more important than anything else. However, many whistleblowers have learned to their dismay that legal protection looks much better on paper than it pans out in reality.

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In recent years, much attention has been on federal whistleblower legislation, long promised and just as long in delivery. Some who follow the details think weak laws are worse than nothing. They give the appearance of protection without the substance.

If you'd like a broad perspective on whistleblower laws, the definitive treatment is Robert G. Vaughn's new book *The Successes and Failures of Whistleblower Laws*. Vaughn is a lawyer and legal academic at American University in Washington, DC. He is exceptionally well qualified to comment, having been on one of Ralph Nader's teams in the 1970s involved with highlighting the problems of whistleblowers and promoting protection.

To help explain the passing of the first major whistleblower law, Vaughn describes a series of social changes that laid the ground in US public opinion. This is a revealing exercise, showing that whistleblower protection should not be separated from social change more generally.

In the US, the traditional attitude towards authorities was conformity and acceptance of the line of command. Speaking out is a challenge to hierarchical authority and had long been seen as traitorous. Public opinion had to change before the plight of whistleblowers could be seen as worthy of concern.

During the 1960s and 1970s in the US, several events generated public awareness that challenged unthinking acceptance of authority. Stanley Milgram carried out experiments showing that many US citizens were so trusting of authority they were willing to apply electric shocks to experimental subjects to a dangerous level and beyond.

Philip Zimbardo ran a different psychology experiment - a simulated prison - that showed randomly assigned students quickly adopted the roles of prisoners and prison guards, dangerously so. These experiments received wide publicity and made people aware of the dangers of automatically accepting the orders of superiors.

In the 1950s and 1960s, the US civil rights movement used nonviolent action - protest marches, bus boycotts, lunch-counter sit-ins and other methods - to challenge the system of racial segregation in southern states. The courageous actions of black people and their supporters attuned the public to the need to challenge discrimination and abuse, including by breaking unjust laws.

The most prominent US whistleblower in the 1960s and 1970s was A. Ernest Fitzgerald, who worked for the US Defense Department monitoring project costs. After exposing a \$2 billion cost overrun for the C-5A aircraft, Fitzgerald suffered a series of classic reprisals. He testified to Congress repeatedly as well as writing a book.

Then came Watergate, the downfall for President Richard Nixon. White House officials ordered the "plumbers", an illegal operation unit, to break into the

office of Daniel Ellsberg's psychiatrist. Ellsberg had leaked the Pentagon Papers, which exposed the true history of the Vietnam war, to the media. Nixon's abortive attempts to cover up this burglary and the later break-in at Watergate eventually led to his resignation. The Watergate scandal was the trigger for the Civil Service Reform Act of 1978, which authorised a massive reorganisation of government bodies. Included in the act was a provision for whistleblower protection.

In terms of recognising and seeking to protect whistleblowers, the US was far ahead of any other country. Vaughn shows very well the impact of several factors in laying the ground for this important innovation: changed public attitudes towards obedience, a prominent whistleblower case, and a dramatic demonstration of corruption in high places.

Whistleblower protection is sometimes justified in terms of cost-effectiveness, for example stopping corruption. Vaughn shows that this approach is too limited. Whistleblowing is important as part of a democratic process of empowering citizens to challenge abuses. It can be seen as allied to the tradition of civil disobedience exemplified by the civil rights movement. It is a type of activism for a better society.

Vaughn provides a careful, detailed analysis of the Civil Service Reform Act, focusing on the whistleblower provision. He speculates about what an informed observer at the time might have forecast as the fate of the act, concluding that optimism was not necessarily justified. One of the problems was that by incorporating whistleblower protection in legislation, it became separated from the traditions of dissent and democratic participation that had stimulated it. Vaughn writes:

... the rich ethical debate about whistleblowing generated considerable support for it. Debate regarding the statute emphasizes administrative or judicial interpretation of it; rather than focusing on the reasons for protecting whistleblowers, this emphasis leads to the often arcane criteria of statutory interpretation enabling agencies and courts to ignore the connection of that statutory language to the

values that generated it. (p. 115)

In a chapter titled "Institutional failure," Vaughn documents the shortcomings of the systems set up to handle whistleblower disclosures. At the centre of the picture is the Office of Special Counsel (OSC), given the power to require federal government agencies to investigate claims about misconduct and respond in writing. The OSC was presented as the solution for whistleblowers, but it turned out to be a false idol. The OSC was inadequately funded for its function. Even worse, most of its heads were ineffective and were more sympathetic to employers than to whistleblowers.

One of the expectations of the OSC was to take action against agencies for reprisals against whistleblowers. However, it hardly ever happens. Vaughn says, "Practically, these actions seem to be a 'dead letter'." (p. 176).

Many whistleblowers in Australia have argued for a stand-alone agency with the mandate to handle disclosures, investigations and action against recalcitrant bureaucrats. However, the experience with the OSC over several decades suggests that having a dedicated agency, however attractive in theory, is no guarantee of effective protection in practice.

Institutional failure has been only part of the problem in the US. Another major obstacle to effective whistleblower protection has been the courts. Vaughn, through a careful analysis, shows how the courts have consistently interpreted whistleblower laws in favour of employers. What looks like an ironclad case from a whistleblower's point of view can be rejected by judges who read meanings into the law that legislators never intended. The US Congress has repeatedly revised the law to deal with narrow court interpretations, only to be repeatedly foiled by judges seemingly determined to take the employer's side. Vaughn documents a range of methods by which judges do this, such as ignoring legislative intent, cherry-picking precedents and manufacturing requirements not present in the letter of the law. Vaughn explains this judicial prejudice as deriving from a deep-seated employer orientation that clashes with the intent of Congress in passing laws with an orientation to open government.

The initial focus of *The Successes and Failures of*

Whistleblower Laws is US laws for public sector employees. From this foundation, Vaughn moves on to cover a range of other important issues, including legislation covering the private sector, national security whistleblowing, anonymous whistleblowing, and global whistleblower laws. Vaughn refers to circumstances in a number of other countries, including Australia. In describing whistleblower-support activities by "civil society" - namely outside of government and the private sector - he focuses on two organisations: the Government Accountability Project (GAP) in the US and Public Concern at Work (PCAW) in Britain.

Vaughn gives a brief rundown on advice for whistleblowers, without attempting to cover this area thoroughly. His attention is always on whistleblower laws. GAP and PCAW are important in this context because of their influence on the introduction and modification of whistleblower laws in the US and Britain. In contrast, the influence of Whistleblowers Australia on Australian whistleblower laws is less obvious.

The Successes and Failures of Whistleblower Laws is carefully argued and comprehensively referenced. It is the work of a lawyer in its attention to detail and precedent, but is accessible to non-lawyers who are willing to put in the effort. It is a long book, and most impressive in its exposition of arguments and evidence for and against various facets of whistleblower legislation. Anyone who puts in significant effort promoting whistleblower laws - for example, writing to or talking with politicians - can benefit from studying relevant parts of the book.

Vaughn's treatment of the history and politics of Australian whistleblower legislation is limited in scope and detail, and some who are intimately familiar with this area might have quibbles. A more useful approach is to look to his book's overall framework and argument as a way of better understanding the Australian experience - and its likely future.

In the preface, Vaughn describes his involvement with US whistleblower laws from the 1970s. After this, he is too modest about his contributions. At various points in the book, where he discusses a significant article, a footnote at the end of the chapter reveals that he was the author of the article. This is the work of a

concerned observer who has been very close to developments, especially in the US.

In the semi-final chapter, Vaughn presents four perspectives on whistleblower laws: employment, open-government, market regulation and human rights. This is a helpful framework. Whistleblowers often think in terms of human rights whereas their employers use the employment perspective. The mix and clash of perspectives helps explain some of the persistent tensions concerning whistleblowing, including rhetorical support for whistleblower protection versus the actual unsympathetic treatment of whistleblowers.

Finally, Vaughn addresses the ethical justifications for whistleblowing. Before the introduction of whistleblower laws, those who spoke out often justified their actions in terms of free speech, public benefit and codes of professional practice. These justifications are readily understandable to and engage with concerns among the wider public. When whistleblower laws are passed, attention often shifts to the letter of the law and failures to apply the law. This means that the ethical justifications are relegated to the background while legal technicalities come to the fore, which is unfortunate for the wider project of promoting a society in which speaking out about problems is safe and routine.

Vaughn's overall task is to judge both the successes and failures of whistleblower laws. He judiciously notes the pluses and minuses along the way. The sidelining of ethical concerns might be counted as one of the minuses, counteracted by the greater protection or deterrent effect sometimes provided by legislation. Vaughn does not pass a final judgement on whistleblower laws, but provides all the information and arguments you need if you want to do so yourself.

Robert G. Vaughn, *The Successes and Failures of Whistleblower Laws* (Cheltenham: Edward Elgar, 2012)

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